Geosains Sdn Bhd & Anor v Selesa Heights Management Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–294 OF 1996
NORAINI ABDUL RAHMAN JC
17 JULY 2009

Contract — Breach — Termination — Termination due to delay in submitting reports — Whether termination wrongful

Contract — Terms — Construction of terms of letter of appointment — Whether terms of agreement required first plaintiff to attend meetings and submit reports to Majlis Perbandaran Ampang Jaya

Evidence — Burden of proof — Counterclaim for damages — Defendants' claim for loss of profits — Whether defendant had to prove how they arrived at their loss of profit

Tort — Defamation — Damages — Whether contents of letter of termination defamatory — Publication of allegedly defamatory letter — Whether there was sufficient evidence of letter being circulated to general public

By way of a letter of appointment dated 3 October 1985, Selesa Heights Management Sdn Bhd, the first defendant, appointed the first plaintiff as specialist geotechnical consultants in their project to develop land situated in Daerah Gombak ('the land)'. The second plaintiff was a managing director of the first plaintiff. The scope of work and the payment of the professional fees were as set out in the letter of appointment. According to the letter of appointment, the first plaintiff was to be paid an agreed lump sum of RM200,000 for the professional services that it would be rendering to the first defendant with the fees to be paid in monthly instalments of RM7,000 commencing from the end of October 1995. In its acceptance of the appointment, the first plaintiff counter proposed the mode of payment by declaring that it was willing to accept a parcel of land measuring not less than 15,000 square feet at a location it chose with the transfer of ownership of the same to be effected by the first plaintiff by 31 December 1996. After preparing and submitting its first report to the first defendant, the first

plaintiff sent the first defendant its first invoice dated 29 January 1996 for four months work calculated at RM15,000 per month and totalling RM60,000. The first plaintiff also submitted a copy of the first report to Majlis Perbandaran Ampang Jaya ('MPAJ') with the intention of lifting a stop work order which had been imposed by the latter on the land. By a letter dated 26 February 1996, the first plaintiff received a cheque for RM28,000, being the fees for four months from October 1995 to January 1996 calculated at RM7,000 per month. On 11 March 1996, the second plaintiff sent its second invoice for a sum of RM90,000. When MPAJ did not lift the stop work order despite the two reports submitted by the first plaintiff, the first defendant terminated the appointment of the first plaintiff with immediate effect. Unhappy with the termination and the contents of the termination letter the plaintiffs filed this present defamation suit against the defendants. By this suit the plaintiffs claimed, inter alia, a sum of RM122,000 for fees due and owing, a sum of RM1,007,500 or a sum the court deems fit as damages for wrongful termination and a further sum of RM15,000 for fees due and owing under the letter of appointment. The defendants in turn counterclaimed for general damages for losses they had incurred. The issues to be determined in this suit were whether the first plaintiff was lawfully terminated by the first defendant, whether the letter of termination was defamatory and whether the first defendant could counterclaim for the losses it had incurred as a result of the first plaintiff's delay in preparing the report to MPAJ.

Held, dismissing the plaintiffs' claim for unlawful termination and defamation but allowing an award of RM12,870.96 and RM15,000 with interest and costs to the plaintiffs; dismissing the defendants' counterclaim with costs:

(1) After receiving the first plaintiff's second invoice the first defendant decided to terminate the agreement because it did not agree to the first plaintiff's counter proposal which was in breach of the agreement. The first defendant's termination of the first plaintiff was lawful as it was within the rights of the first defendant. As such the plaintiffs' claim for RM122,000 and RM1,007,500 as damages for wrongful termination was dismissed. However, as the first plaintiff had rendered services for five months and 26 days but been paid only RM28,000 for four months work they were allowed a sum of RM12,870.96 for work done with interest (see paras 14–16).

(2) The fact that the second plaintiff knew of the stop work orders did not mean that the plaintiffs knew of the stop work order at the time of their appointment. According to the terms of the agreement the scope of work did not include the first plaintiff having to attend meetings and

submitting reports to MPAJ. As such the sum of RM15,000 claimed by the first plaintiff as fees due and owing under the letter of appointment was allowed with interest (see paras 18–19).

(3) Although the letter of termination was copied to two persons, the two persons were agents of the first defendant through whom the letter of appointment was made. As agents they had to be informed of the termination. Further there was no other evidence that the letter which was alleged to be defamatory was circulated to the general public. The claim for defamation was thus dismissed (see para 20).

(4) The defendants claimed that the stop work order imposed by MPAJ on the land was not lifted because the first plaintiff had delayed in preparing the report and which when submitted was not satisfactory. The defendants alleged that this led to the owner of the land terminating its contract with the defendants and the latter incurring a loss of profit of RM38,359,200. However, the defendants did not provide any evidence as to how they arrived at that figure as their loss of profit. The plaintiff had the burden of proving damages in the case and the same principle is applicable to a counterclaim made by a defendant where the defendant was claiming damages. As the defendants had not proven their claim their counterclaim was dismissed with costs (see paras 21–23).

[Bahasa Malaysia summary

Melalui surat pelantikan bertarikh 3 Oktober 1985, Selesa Heights Management Sdn Bhd, defendan pertama, telah melantik plaintif pertama sebagai pakar perunding geoteknikal dalam projek mereka untuk membangunkan tanah yang terletak di Daerah Gombak ('tanah tersebut'). Plaintif kedua merupakan pengarah urusan plaintif pertama. Skop kerja dan bayaran yuran profesional telah ditetapkan dalam surat pelantikan. Menurut surat pelantikan itu, plaintif pertama akan dibayar jumlah sekaligus yang dipersetujui sebanyak RM200,000 untuk perkhidmatan yang akan diberikan kepada defendan pertama dan yuran tersebut akan dibayar secara ansuran bulanan sebanyak RM7,000 bermula akhir Oktober 1995. Semasa menerima pelantikan tersebut, plaintif pertama telah membuat tawaran balas tentang cara pembayaran dengan menyatakan bahawa ia sedia menerima sebidang tanah berukuran tidak kurang daripada 15,000 kaki persegi di lokasi yang dipilih olehnya bersama pindah milik hak milik tanah tersebut yang perlu dikuatkuasakan oleh plaintif pertama sebelum 31 Disember 1996. Setelah menyediakan dan mengemukakan laporan pertamanya kepada defendan pertama, plaintif pertama telah menghantar kepada defendan pertama invois pertamanya bertarikh 29 Januari 1996 untuk kerja selama empat bulan yang dikira pada harga RM15,000 sebulan dan keseluruhannya berjumlah

RM60,000. Plaintif pertama juga telah mengemukakan sesalinan laporan pertama itu kepada Majlis Perbandaran Ampang Jaya ('MPAJ') dengan niat untuk membatalkan perintah berhenti kerja yang telah dikenakan oleh MPAJ ke atas tanah tersebut. Melalui surat bertarikh 26 Februari 1996, plaintif pertama telah menerima cek berjumlah RM28,000 yang merupakan yuran untuk empat bulan dari Oktober 1995 hingga Januari 1996 yang dikira pada harga RM7,000 sebulan. Pada 11 Mac 1996, plaintif kedua telah menghantar dua invois berjumlah RM90,000. Apabila MPAJ tidak membatalkan perintah berhenti kerja meskipun dua laporan telah dikemukakan oleh plaintif pertama, defendan pertama telah menamatkan pelantikan plaintif pertama dengan serta merta. Berasa tidak puas hati dengan penamatan itu dan kandungan surat penamatan itu plaintif telah memfailkan guaman fitnah ini terhadap defendan-defendan. Melalui guaman ini plaintif-plaintif menuntut, antara lain, sejumlah RM122,000 untuk yuran yang belum dijelaskan dan perlu dibayar, sejumlah RM1,007,500 atau jumlah yang difikirkan sesuai oleh mahkamah sebagai ganti rugi terhadap penamatan yang salah itu dan selanjutnya sejumlah RM15,000 untuk yuran yang belum dijelaskan dan perlu dibayar di bawah surat pelantikan. Defendan-defendan sebaliknya telah menuntut balas ganti rugi am untuk kerugian yang ditanggung. Isu-isu yang perlu ditentukan dalam guaman ini adalah: (1) sama ada plaintif pertama telah ditamatkan dengan sah oleh defendan pertama; (2) sama ada surat penamatan berunsur fitnah; dan (3) sama ada defendan pertama boleh menuntut balas untuk kerugian yang telah ditanggungnya akibat kelewatan plaintif pertama menyediakan laporan kepada MPAJ.

Diputuskan, menolak tuntutan plaintif kerana penamatan yang menyalahi undang-undang dan fitnah tetapi membenarkan award berjumlah RM12,870.96 dan RM15,000 dengan faedah dan kos kepada plaintif-plaintif; menolak tuntutan balas defendan-defendan dengan kos:

(1) Setelah menerima invois kedua plaintif pertama defendan pertama telah memutuskan untuk menamatkan perjanjian kerana ia tidak bersetuju dengan cadangan balas plaintif pertama yang telah melanggar perjanjian. Penamatan defendan pertama terhadap plaintif pertama adalah sah kerana merupakan salah satu hak defendan pertama. Oleh itu tuntutan plaintif untuk RM122,000 dan RM1,007,500 sebagai ganti rugi kerana penamatan yang salah telah ditolak. Namun begitu, oleh kerana plaintif pertama telah memberikan perkhidmatan selama lima bulan dan 26 hari tetapi hanya dibayar RM28,000 untuk kerja empat bulan mereka telah dibenarkan sejumlah RM12,870.96 untuk kerja yang telah dilakukan dengan faedah (lihat perenggan 14–16).

(2) Hakikat yang plaintif kedua mengetahui tentang perintah-perintah berhenti kerja tidak bermaksud bahawa plaintif-plaintif mengetahui

tentang perintah berhenti kerja tersebut pada masa pelanti kan mereka. Menurut terma-terma perjanjian, skop kerja tidak memerlukan plaintif menghadiri mesyuarat dan mengemukakan laporan kepada MPAJ. Oleh itu jumlah RM15,000 yang dituntut oleh plaintif pertama sebagai yuran yang belum dijelaskan dan perlu dibayar di bawah surat pelantikan dibenarkan dengan faedah (lihat perenggan 18–19).

(3) Meskipun surat penamatan telah dibuat salinan untuk dua orang, kedua-dua mereka merupakan ejen defendan pertama melalui surat pelantikan yang dibuat. Sebagai ejen mereka perlu dimaklumkan tentang penamatan tersebut. Bahkan tiada bukti lain bahawa surat yang dikatakan berunsur fitnah itu telah diedarkan kepada orang awam. Tuntutan untuk fitnah dengan itu ditolak (lihat perenggan 20).

(4) Defendan-defendan mendakwa bahawa perintah berhenti kerja yang dikenakan oleh MPAJ ke atas tanah tersebut tidak dibatalkan kerana plaintif pertama telah lewat menyediakan laporan dan apabila dikemukakan tidak memuaskan. Defendan-defendan mengatakan bahawa ini membawa kepada pemilik tanah tersebut menamatkan kontraknya dengan defendan-defendan dan mereka menanggung kerugian memperoleh keuntungan berjumlah RM38,359,200. Walau bagaimanapun, defendan-defendan tidak mengemukakan apa-apa bukti tentang bagaimana mereka mencapai jumlah tersebut sebagai kerugian memperoleh keuntungan mereka. Plaintif mempunyai beban membuktikan kerugian dalam kes ini dan prinsip yang sama terpakai terhadap tuntutan balas yang dibuat oleh defendan di mana defendan yang menuntut ganti rugi. Oleh sebab defendan-defendan tidak membuktikan tuntutan mereka maka tuntutan balas mereka ditolak dengan kos (lihat perenggan 21–23).]

Notes

For a case on termination see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2713.

For cases on burden of proof in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 303–598.

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 287–300.

For cases on terms in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 5218–5411.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, FC (folld)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (folld)

S Mohan Kumar (Wan Balbir & Associates) for the plaintiffs.
K Lopez (Kamarudin & Partners) for the defendants.

Noraini Abdul Rahman JC:

FACTS

[1] The first defendant, Selesa Heights Management Sdn Bhd by letter dated 3 October 1995, through Pentadel Sdn Bhd appointed the first plaintiff, Geosains Sdn Bhd as specialist geotechnical consultant for the development of Bukit Perdana on Lots 13429, 13430 and 13432, Mukim Ulu Klang, Daerah Gombak. According to the letter of appointment, the agreed professional fees to be paid by the first defendant to the first plaintiff was a lump sum of RM200,000. The fees will initially be paid by monthly of RM7,000 beginning from end of October 1995. The scope of work of the first defendant is as set out in the letter of appointment. The first plaintiff completed and submitted a first report to the first defendant. A second report was prepared by the first plaintiff but was not submitted to the first defendant because the first plaintiff wanted payment of fees it had billed the first defendant before it would submit that second report.

[2] Meanwhile the first plaintiff had prepared and submitted to Majlis Perbandaran Ampang Jaya, two reports ('MPAJ reports') with the intention of lifting a stop work order which MPAJ had imposed on Idris Hydraulic Properties Sdn Bhd (the owner of the land). Idris Hydraulic then, by letter dated 6 October 1995 informed first defendant of the said stop work order. Despite the two MPAJ reports submitted by the first plaintiff to MPAJ, the stop work order was not lifted. By letter dated 29 March 1996, the first defendant terminated the said appointment of the first plaintiff with immediate effect.

[3] The first and second plaintiffs, unhappy with the termination and the contents of the said termination letter which it alleges as defamatory, filed this suit against the defendants. The defendants counterclaimed for general damages for loss (mengalami kerugian).

[4] At the outset, it is clear from documentary evidence that the first plaintiff was appointed from 3 October 1995 until their termination by way of the letter dated 29 March 1996. They were therefore engaged as consultant for a period of five months and 26 days.

THE PLAINTIFF'S CLAIM

[5] The first plaintiff claims against the first defendant as follows:

5.1 Under the letter of appointment:

(i) a sum of RM122,000 for fees due and owing; A

(ii) RM1,007,500 for damages for wrongful termination or a sum that this Court deems fit; and

5.2 a sum of RM15,000 for fees due and owing under the agreement (ie letter of appointment); B

5.3 interests and costs.

[6] The letter of appointment (agreement) dated 3 October 1995 has the following terms: C

> Professional fees
>
> The agreed Professional Fees is a Lump Sum of Ringgit Malaysia Two Hundred Thousand only (RM200,000.00 only).
>
> The Fees will initially be paid by monthly installments of RM7,000 beginning from the end of October 1995. D
>
> Please indicate your acceptance of this appointment by signing and returning to us the enclosed duplicate of this letter.
>
> Thank you. E
>
> Yours faithfully
>
> PENTADEL SDN BHD
>
> Sgd F
>
> ZULKHARNAIN ARIFFIN
>
> Director
>
> cc Selesa Heights Management Sdn Bhd.

G

[7] The plaintiffs accepted the offer of appointment. This acceptance was written on the same letter that Pentadel (first defendant's agent) sent to the first plaintiff at the bottom of p 2. The acceptance is worded as follows: H

> We thank you and have pleasure accepting your offer of appointment. The said lump sum fee relates to the present requirements of constructing only the infra-structure (roads, drains, water supply) to the site with the objective of selling defined parcels of land.
>
> In lieu of payment, as discussed, our company is willing to accept a parcel of land measuring no less than 15,000 square feet at a location of our choice; the ownership of the same to be transferred to our company by 31st December 1996. Please arrange for Owners' acceptance of collatual arrangement. We are grateful to you for your very kind considerations, and would be ready to assist you in any future development of the site you contemplate on. I

A Sgd

Ong Kik Hong

Managing Director.

B It is to be noted that the acceptance does not have any date.

[8] On 29 January 1996 the first plaintiff sent a first invoice to the first defendant by way of letter (exh P11). The amount invoice was for a sum of RM15,000 per month, totaling RM60,000 for four months work.

C

[9] On 30 January 1996, the first plaintiff through the second plaintiff who is it's managing director, sent a handwritten note (exh P12) requesting payment before it would submit the next MPAJ report. The note reads as follows:

D

30-1-1996

Dear En Zul

Good to talk to you yesterday. Would deeply appreciate spot payment for the last
E 5 months work, before we submit the next MPAJ Report — No arm twisting involved at all.

Best regards.

Sgd

F (ONG KIK HONG)

[10] By letter dated 26 February 1996 (exh P13) the first plaintiff sent a cheque for a sum of RM28,000 being the fees for four months from October 1995 to January 1996. This sum would be at RM7,000 per month.

G

[11] By letter dated 11 March 1996, the first plaintiff sent the second invoice for a sum of RM90,000 (exh P15).

H **[12]** Thereafter by letter dated 29 March 1996, the first defendant terminated the agreement.

[13] The issue before the court is whether the termination was lawful or not. The court is of the opinion that the termination is lawful and that the
I first defendant had exercised its right within the law. The letter of appointment clearly set the term of payment of professional fees ie a lump sum of RM200,000 only and initially RM7,000 to be paid to the first plaintiff beginning from the end of October 1995. However, in it's acceptance of the appointment, the first plaintiff, counter proposed as to the

mode of payment ie that the first plaintiff was willing to accept a parcel of land measuring not less than 15,000 square feet at a location it chooses and that ownership of the same is to be transferred to the first plaintiff by 31 December 1996.

[14] The first defendant, after receiving the first plaintiff's second invoice decided to terminate the agreement because it did not agree to the counter proposal as it alleged that the first plaintiff was in breach of the agreement.

[15] This court is of the opinion that the termination was lawful and was within the rights of the first defendant. Thus the first plaintiff's claim in prayer (a)(i) and (a)(ii) of the statement of claim is dismissed with costs.

[16] However, since the first plaintiff had been paid only RM28,000 for four months work when actually it had rendered it's services for five months and 26 days, the court is allowing a sum of RM12,870.96 for the first plaintiff for work done. This is calculated as follows:

Work done by first plaintiff For five months 26 days	RM40,870.96
Less RM28,000 for four months work	RM28,000
Total:	RM12,870.96 ==========

The court is awarding a sum of RM12,870.96 with interests at 8% from date of filing till date of full settlement and costs.

[17] On the issue of the services rendered by the first plaintiff in attending meetings and submitting two reports to MPAJ (MPAJ reports), the court is of the view that this is not part of the term of appointment as in letter dated 3 October 1995. There was no specific reference to this in the said letter.

[18] There were two stop work orders issued by MPAJ to the landowner, Idris Hydraulic by way of letters from MPAJ dated 22 September 1995 and 25 September 1995. Idris Hydraulic in turn informed the first defendant about the stop work orders. The defendants alleged that the plaintiffs knew of the stop work orders right from the time when first plaintiff was appointed as independent consultant. PW1 in her evidence in chief stated that she and the first plaintiff only became aware of the stop work order on 12 December 1995. That being the case, the court relied on the minutes of site meetings to determine when actually the plaintiffs knew of the stop work orders. Notes of Site Meeting No 6 (p 158 bundle of document C) held on Friday 1 December 1995 shows that the second plaintiff attended the meeting. Paragraph 9 of the minutes contained the following:

9 ANY OTHER BUSINESS

9.1 Discussion with En Othman, Engineer from MPAJ on lifting of stop work order.

KHO

9.1.1 Report from independent consultant to be submitted to MPAJ as soon as possible.

9.1.2 Mr Lee Hock Siew to submit a report on work done to meet recommendations of the Independent consultants. This should include 'before' and 'after' photographs.

HSL

9.1.3 If satisfied with protection works MPAJ will lift Stop Work Order.

9.1.4 To an enquiry as to whether the Stop Work Order can be lifted separately for the 3 lots, En Othman stated that since the application is a single request for MPAJ approvals he will have to treat it as one project. He will, however, consider the possibility of looking at the 3 lots separately if possible.

9.1.5 En Othman emphasised that all exposed slopes should be planted with grass and that the Silt Traps should be maintained.

LSEW

[19] The minute at 9.1 clearly show that KHO (second plaintiff) knew of the stop work orders as she has had discussions with one Encik Othman, engineer from MPAJ. But this does not mean that the plaintiffs knew of the stop work order at the time of their appointment as consultants. Upon construction of the terms of agreement (exh P1) the court is of the view that on the balance of probability, the scope of works does not include the meetings and the two reports to MPAJ. As such, the court is allowing the claim of RM15,000 for fees under prayer (b) of the statement of claim with interests at 8% from date of filing till date of full settlement and costs.

[20] On the issue of defamation, the court is of the opinion that the claim be dismissed with costs for the following reason:

(a) the letter of termination from the first defendant dated 29 March 1996 (exh P16) was copied to two persons ie Samuel S Jesuthasan and Tham Tuck Keen, both from Pentadel, the agent of the first defendant and through whom the letter of appointment (exh P1) was made. Therefore,

they being the agent had to be informed of the termination as from the evidence of PW1, the first plaintiff and PW1 herself had been dealing with Pentadel.

(b) there was no evidence through witnesses who had seen the letter which is alleged to be defamatory. There was no witness either a clerk, a typist or any other staff of first defendant and Pentadel called to give evidence that they had knowledge of the letter nor was there evidence that the letter was circulated to the general public.

COUNTERCLAIM BY THE DEFENDANT

[21] I now turn to the counterclaim of the defendants. In their counterclaim, the defendants alleged that it had asked the plaintiff to prepare a report to MPAJ for the purpose of lifting the stop work order. The defendant further alleged that the first plaintiff was late in preparing the report which it also alleged was not satisfactory resulting in the defendant incurring losses.

[22] DW1 gave evidence that the company had suffered loss of profit because the landowners terminated their contract in April 1996. DW1 tendered only one single document which is only one page to support the loss of profit of RM38,359,200 ie the cash flow projection (exh D23). There was no evidence given as to how the defendant arrived at that figure. DW1 merely tendered the cash flow projection and had left it to the court to analyse the cash flow projection and eventually to award the sum the court thought fit. In *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, Ong Hock Thye FJ said the following:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd*:
>
> > The plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court saying, 'This is what I have lost. I ask you to give me these damages. They have to prove it'.

Although the Federal Court (judgment of Ong Hock Chye FJ) referred to the burden of proving the amount of damages to be that of the plaintiff in the case, the same principle is applicable to a counterclaim made by a defendant

because in a counterclaim the defendants are also asking for damages. To borrow the language used by Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177, it is not enough to write down particulars but the defendant so to speak threw them at the head of this court saying:

> I have suffered losses. Even though I do not in my counterclaim state the amount suffered by me, I ask the court to give whatever the court deems fit to me.

[23] For that reason, the defendants' counterclaim is dismissed with costs.

Plaintiffs' claim for unlawful termination and defamation dismissed but an award of RM12,870.96 and RM15,000 allowed with interest and costs to the plaintiffs. The defendants' counterclaim dismissed with costs.

Reported by Kohila Nesan